

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CLAYTON THOMAS : : **CIVIL ACTION**
v. : :
BEN VARNER, et al. : : **NO. 02-4778**

ORDER

AND NOW, this _____ day of May, 2004, upon consideration of the Petition for Writ of Habeas Corpus (docket no. 9) and the responsive filings, it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Charles B. Smith of September 26, 2003 is **APPROVED** and **ADOPTED**.
 2. Count II of the Petition is **GRANTED** and Petitioner's conviction is **VACATED**.
 3. Counts I, III, and IV of the Petition are **DENIED** with prejudice.
 4. The execution of the writ of habeas corpus is **STAYED** for 120 days from the date of this Order, during which period the Commonwealth of Pennsylvania may commence a new trial.
 5. If the Commonwealth of Pennsylvania does not commence a new trial within 120 days from the date of this Order, Petitioner shall be released from custody.
 6. Pursuant to 28 U.S.C. § 2253, a certificate of appealability is issued.

7. If an appeal to the United States Court of Appeals for the Third Circuit is filed in a timely fashion, this Order will be stayed pending disposition of that appeal pursuant to Local Rule of Civil Procedure 9.4(12).

BY THE COURT:

BRUCE W. KAUFFMAN, J.